

September 2008

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## Senate Passes Bill to Extend Energy Tax Credit Provisions

On September 23, 2008, the Senate passed the "Energy Improvement and Extension Act of 2008" (substitute amendment to H.R. 6049) (the "Bill") by a vote of 93-2. [A copy of the Bill is available here.](#)

The Administration has issued a Statement of Administration Policy supporting the prompt passage of the Bill, despite the fact that the Administration opposes several provisions in the Bill. [A copy of the SAP is attached.](#)

Senate Majority Leader Reid has urged the House to pass the Senate version of the Bill in its current form in order to prevent a conference and to allow the Bill to be enacted. However, indications are that the House plans to vote on an amendment in the nature of a substitute to the Senate version of the Bill. If so, either the Senate will need to pass the revised House version of the bill, or the House and Senate versions of H.R. 6049 will need to be reconciled in conference committee. If the bills go to conference committee, any agreed upon final bill would have to be passed once again by both the House and the Senate. Because Congress has turned much of its attention this week to the ailing financial markets, it is not clear whether they will be able to reconcile the different versions of the energy extenders package before they break for recess. Another option is to try to conference during recess and hope to pass a conference bill during

a lame duck session in either November or December, but this is not likely to be as politically advantageous as sending a final bill to the President before heading home for the November elections.

### Section 45

#### Extension

The Bill would extend the placed-in-service deadline for one year (through the end of 2009) for facilities producing electricity from wind and refined coal facilities. However, the Bill would extend the placed-in-service deadline for two years (through the end of 2010) for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, and qualified hydropower. The Bill does not provide an extension for Indian coal facilities and solar facilities (under section 45). In addition, the Bill does not contain an investment-based limitation on the credit amount as proposed in various House-passed energy tax credit extension bills.

#### Marine/Hydrokinetic

The Bill also would add marine and hydrokinetic renewable energy as a qualified resource under section 45. The Bill defines marine and hydrokinetic renewable energy as energy derived from (1) waves, tides, and currents in oceans, estuaries,

and tidal areas; (2) free flowing water in rivers, lakes, and streams; (3) free flowing water in an irrigation system, canal, or other man-made channel (including projects that use non-mechanical structures to accelerate the flow of water for electric power production purposes); or (4) differentials in ocean temperature (ocean thermal energy conversion). The term excludes energy derived from any source that uses a dam, diversionary structure (except for irrigation systems, canals, and other man-made channels), or impoundment for electric power production.

A marine and hydrokinetic renewable energy facility would include any such facility placed in service after the date of enactment and before January 1, 2012, that produces electric power from marine and hydrokinetic renewable energy and that has a nameplate capacity rating of at least 150 kilowatts. The credit amount for such facilities would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill terminates these facilities as a separate category.

#### **Qualified Hydropower Production**

The Bill would modify the definition of nonhydroelectric dam for purposes of qualified hydropower production by (i) requiring it to be operated for flood control, navigation, or water supply purposes and (ii) replacing the requirement that the project not enlarge the diversion structure or bypass channel, or impound additional water from the natural stream channel, with a requirement that the project be operated so that the water surface elevation at any given location and time be the same as would occur in the absence of the project.

#### **Other Section 45 Provisions**

The Bill would modify the definition of refined coal by deleting the increased market value requirement and increasing the emission reduction requirement for sulfur dioxide or mercury from 20 percent to 40 percent. The Bill would also modify the definition of qualified trash combustion facilities to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. Finally, the Bill would allow expansions of existing open-loop and closed-loop biomass facilities to qualify for the section 45 credit to the extent of the increased amount of electricity produced at such facilities by reason of the addition of the new unit.

#### **Steel Industry Fuel**

The Bill would also provide that steel industry fuel is refined coal for purposes of section 45. The Bill defines steel industry fuel as a fuel that (a) is produced by liquifying coal waste sludge — tar decanter sludge and related by products of the coking process — and distributing it on coal, and (b) is used as a feedstock for the manufacture of coke. The credit amount is \$2.00 (or \$3.00 — the legislative language at this time is unclear) per barrel-of-oil equivalent of steel industry fuel, and the amount is increased for inflation each year. The credit period begins on the later of (i) the date the facility was placed-in-service, (ii) the date modifications to an existing facility that would allow such facility to produce steel industry fuel were placed-in-service, or (iii) October 1, 2008, and ends on the later of (x) December 31, 2009, or (y) the date which is one year from the date such facility or the modifications to a facility were placed in service. A steel industry fuel facility (or modification to a facility) must be placed

in service before January 1, 2010. The steel industry fuel amendments would be effective for fuel produced and sold from facilities placed in service after September 30, 2008.

#### **Section 48**

The Bill would extend for eight years the placed-in-service deadline (through the end of 2016) for solar energy, fuel cell, and microturbine property. The Bill would also permit the energy credit determined under section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise the \$500 per half kilowatt of capacity credit cap for fuel cell property to a \$1,500 per half kilowatt of capacity credit cap, effective as of the date of enactment.

#### **Combined Heat and Power Property**

The Bill would add a new category of energy property to section 48 for combined heat and power property (“CHP property”). CHP property is defined as property comprising a system: (A) that uses the same energy source for the simultaneous or sequential generation of electrical power, mechanical shaft power, or both, in combination with the generation of steam or other forms of useful thermal energy (including heating and cooling applications); (B) that produces (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical

or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) that exceeds 60 percent (with a special rule for systems using biomass); and (D) that is placed in service before January 1, 2017. CHP property would be eligible for the 10 percent energy credit under section 48, subject to various limitations based on electrical or mechanical capacity.

### **Small Wind Property**

The Bill would also add a second new category of energy property to section 48 for small wind property. Small wind property is defined as a wind turbine that has a nameplate capacity of not more than 100 kilowatts and that is placed in service before January 1, 2017. Small wind property would be eligible for the 30 percent energy credit under section 48, subject to a limitation of \$4,000 per taxpayer.

### **Geothermal Heat Pump Systems**

Finally, the Bill would add a third new category of energy property to section 48 for geothermal heat pump systems — equipment which uses the ground or ground water as a thermal energy source to heat a structure or as a thermal energy sink to cool a structure — which is placed in service before January 1, 2017. Such property would be eligible for a 10 percent energy credit.

### **Clean Renewable Energy Bonds**

The Bill would create a new category of clean renewable energy bonds (“New CREBs”) to finance qualified renewable energy facilities that (a) qualify under section 45 (other than refined coal or Indian coal facilities and without regard to placed-in-service dates), and (b)

are owned by public power providers (“PPPs”), governmental bodies, or cooperative electric companies (“CECs”). A PPP is a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act.

The bond limitation for the New CREBs would be \$800 million, of which no more than one-third may be allocated to projects of PPPs, governmental bodies, or CECs. Allocations to projects of PPPs would be made in such manner that the amount allocated to each such project bears the same ratio to the cost of such project as the maximum allocation limitation to projects of PPPs bears to the cost of all such projects.

Under the New CREBs program, 100 percent of the proceeds of New CREBs (less issuance costs of no more than 2 percent of the bond) and any investment earnings on such proceeds would be required to be used on capital expenditures for the project within three years of the date of issuance (with limited exceptions). The Bill also would provide that the tax credit rate for New CREBs is a rate that is 70 percent of the rate that would permit issuance of a New CREB without discount and interest cost to the issuer; the credit would be claimed against both regular and AMT tax liability; any unused credit could be carried forward; and credits could be “stripped” from the ownership of the bond, similar to the “stripping” of interest coupons for tax-exempt bonds.

Finally, the Bill extends the deadline for issuance of current allocations of “old” CREBs by one year — from December 31, 2008 to December 31, 2009.

The Bill would also create a new tax credit bond program for “qualified energy conservation bonds” (“QECBs”).

The rules for QECBs are similar to those for New CREBs. Set forth below are the significant highlights of the QECB program under the Bill.

- QECB Purposes — projects related to reducing energy consumption in publicly-owned buildings by at least 20 percent; implementing green community programs; rural development involving renewable energy production; qualified facilities as determined under Section 45(d) (other than refined coal or Indian coal facilities and without regard to placed-in service dates) (i.e., the same projects that qualify under the New CREBs); certain research facilities generally involving increasing energy efficiency and reducing fossil fuel consumption; commuting facilities that reduce energy consumption (and pollution); certain demonstration projects; and energy efficiency public education campaigns.
- QECB Allocation — \$800 million to be distributed among the States and further subdivided among large local governments (i.e., population of 100,000 or more), all proportionately based on population. Indian tribal governments are to be treated in the same manner as large local governments.

### **Section 48A/48B**

The Bill would increase the section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional \$1.25 billion in credits to qualifying projects. The Bill would also increase the section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and to permit the

allocation of an additional \$250 million in credits to qualifying projects. The allocation would be effective on the date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment which separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment which separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or

maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the Secretary to give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

Finally, the Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded.

#### **Other Provisions**

The Bill also contains various other provisions that would, among other things:

- Provide a tax credit for the capture and sequestration of carbon dioxide at certain projects.
- Provide a five-year extension of the energy efficient commercial building deduction under section 179D.
- Provide an eight-year extension of the tax credit for residential energy efficient property under section 25D and make various modifications to the program.
- Extend and modify various tax credits available for certain liquid renewable fuels, including biodiesel, renewable diesel, and other alternative fuels.

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